IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1631

LEONARD BERLIN,

Petitioner,

vs.

GILBERT NATHAN, HARRIET NATHAN, FRED BENJAMIN and STUART SHAPIRO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To the Justices of the Supreme Court of the United States:

Petitioner, Leonard Berlin, respectfully prays that a Writ of Certiorari issue to review the decision and order of the Illinois Supreme Court[1] denying review of the

[1] The reasons for directing the Writ to the Illinois Supreme Court, as opposed to a lower court, are set forth at pages 5-6 below. Alternatively, if the Court deems it more appropriate that the Writ be directed instead to the Illinois Appellate Court, it is requested that this Petition be so read.

judgment and opinion of the Illinois Appellate Court, First Judicial District, reversing a judgment in his favor by the Circuit Court of Cook County, Illinois upon a jury verdict.

The Petitioner, a Board-certified Radiologist, had been the object of a $125,000 malpractice suit brought by Harriet Nathan for alleged negligent diagnosis and treatment of an injury to her little finger. In a separate action, Petitioner Berlin countersued against Nathan and her attorneys, alleging, *inter alia*, that the Nathan suit was groundless and wilfully and wantonly brought with reckless disregard as to the truth or falsity of the allegations. Upon trial, the jury specifically found that the Respondents had brought the suit in a wilful and wanton manner, without probable cause to believe that any of the allegations against Petitioner had any substance in fact. It awarded Petitioner $2,000 actual and $6,000 punitive damages.

The Illinois Appellate Court, First Judicial District, reversed the judgment, holding that the Petitioner had not met Illinois' restrictive criteria for the ancient form of action of Malicious Prosecution, including the necessity for a showing of "special injury."[2]

Petitioner then petitioned the Illinois Supreme Court for leave to appeal, contending, *inter alia*, that the

[2] "Special injuries" have been defined in Illinois decisions based on ancient common law criteria, as consisting of injury of a highly unusual and distinctive nature, such as seizure of goods by writ of attachment (*Larence v. Hagerman*, 56 Ill. 68 (1870), and bodily arrest (*Cripe v. Pevely Dairy Co.*, 275 Ill.App. 231 (1934)). Intervening decisions of this Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), and *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972) have largely eradicated those few procedures wherein "special injury" could be said to be present in a court case.

Illinois Appellate Court's decision, by adhering to these outmoded and unworkable standards of pleading and proof, effectively deprived him of access to the courts to redress his actual and proven injury, in violation of his Constitutional rights under the Fourteenth Amendment of the Constitution of the United States. He further contended that such appeal was as of right to the Illinois Supreme Court, since under that Court's own rules, Federal Constitutional issues which first emerge by reason of a decision of the Illinois Appellate Court *must* be reviewed by the Illinois Supreme Court. That Court denied the Petitioner's request for leave to appeal, necessarily rejecting Petitioner's claim that Federal Constitutional issues had arisen. Petitioner's Petition for Reconsideration, reasserting these same contentions, was similarly denied.

OPINIONS BELOW

The Opinion of the Illinois Appellate Court, First Judicial District, rendered on September 14, 1978, is reported at 64 Ill.App.3d 940, 381 N.E.2d 1367 (1978). That Opinion is reproduced as Appendix A to this Petition. The Illinois Supreme Court rendered no opinion in refusing to grant Petitioner's Petition for Leave to Appeal. Likewise, no opinion accompanied its denial of Petitioner's Petition for Reconsideration. The aforesaid Orders of the Illinois Supreme Court are attached hereto as Appendix Exhibits B and C, respectively.

JURISDICTION

The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on January 25, 1979. It denied Petitioner's Petition for Reconsideration on March 12, 1979. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Illinois Supreme Court erred in failing to identify and consider, in conformity with its own rules, substantial questions of due process and equal protection under the Fourteenth Amendment which emerged as a result of the Illinois Appellate Court's reversal of the trial court judgment and damage award based on special jury findings that Respondents had wilfully and wantonly brought a groundless lawsuit against Petitioner, to his resultant injury?

2. Whether the granting of immunity to attorneys and litigants from having to respond in damages for bringing wilful, wanton and groundless (as opposed to merely negligent) lawsuits, to the injury of others, violates the victim's right of access to the courts, as guaranteed by the due process and equal protection provisions of the Fourteenth Amendment?

NATURE OF THE RELIEF SOUGHT

While Petitioner will show that the Illinois Appellate Court's decision effectively deprived him and persons similarly situated of meaningful access to the courts to redress injury in violation of Federal Constitutional standards, no direct review and reversal of that decision is sought herein. The Supreme Court is not asked at this time to rule definitively concerning the Constitutional adequacy of Illinois' tort law, nor is it asked to affirmatively refashion a new Illinois remedy which will pass Constitutional muster. Rather, the sole objective of this Petition is to correct the Illinois Supreme Court's erroneous refusal to identify substantial Federal Constitutional questions which necessarily arose when the Appellate Court reversed the judgment that had been awarded to Dr. Berlin and to cause the Illinois Supreme Court to determine whether Illinois law affords a remedy in the circumstances of this case meeting Federal requirements of due process and equal protection. *Cf. Case v. Nebraska*, 381 U.S. 336, 81 S.Ct. 1486 (1965).

Since, as we will show below, the case *does* implicate serious Federal Constitutional questions, it was not only the right but the duty of the Illinois Supreme Court to hear and consider those issues in a review of the Appellate Court's decision.[3] This Honorable Court is the final arbiter in determining the presence or absence of such federal issues and it should remand the case to the

[3] The inescapable Fourteenth Amendment considerations of due process and equal protection were unambiguously presented by Petitioner to the Illinois Supreme Court in his Petition for Leave to Appeal, and in his Petition for Reconsideration. In his Petition for Leave to Appeal, Petitioner stated, in pertinent part:

(Footnote continued on following page)

Supreme Court of Illinois, with instructions to properly hear and consider those issues in accordance with its jurisdictional duty;[4] also, to determine whether Illinois

[3] *continued*

"In reversing the jury verdict and trial court judgment, the Appellate Court erroneously deprived Plaintiff of due process of law as guaranteed . . . by the Fourteenth Amendment to the United States Constitution" (Petition for Leave to Appeal, at 4).

It was further stated as follows:

"By holding that the Plaintiff has not stated a cause of action, the Appellate Court has deprived him of due process of law and has granted immunity to lawyers and litigants which is not sanctioned by the law."

* * * *

"To deny relief is to deny litigants the same rights which are granted to others similarly harmed." (Petition for Leave to Appeal, at 27, 28)

[4] It is indisputably the duty of the Illinois Supreme Court, under its own rules and Illinois Constitutional provisions, to hear and consider Federal Constitutional questions which emerge as a result of action taken by the Appellate Court. Rule 317 of the Illinois Supreme Court Rules, Ill.Rev.Stat.Ch. 110A, § 317 provides, in pertinent part, that "appeals from the Appellate Court shall lie to the Supreme Court [Illinois] as a matter of right in cases in which a question under the Constitution of the United States . . . arises for the first time in and as a result of the action of the Appellate Court." Similarly, Article VI, § 4(c) of the Illinois Constitution of 1970, provides in pertinent part:

"Appeals from the Appellate Court to the Supreme Court are a matter of right *if a question under the Constitution of the United States . . . arises for the first time in and as a result of the action of the Appellate Court . . .* " (Emphasis added)

These cited provisions are not merely matters of state law which superficially might be viewed as outside of the cognizance of the United States Supreme Court; rather, they are imbued with a Federal Constitutional aspect which under the Supremacy Clause, Article VI of the U.S. Constitution, cannot be left solely and finally to a state tribunal. The inquiry posed by these provisions necessarily involves issues which are ultimately the province of this Court. *Claflin v. Houseman*, 93 U.S. 130 (1876); *Second Employers Liability Cases*, 223 U.S. 1 (1912); and *Testa v. Katt*, 330 U.S. 386 (1947).

law affords, in the circumstances of the instant case, a judicial remedy meeting at least the minimum requirements of due process and equal protection.

STATEMENT OF FACTS

Dr. Leonard Berlin is a Board-certified Radiologist. In October, 1973, Dr. Berlin reviewed and interpreted x-rays taken of Harriet Nathan's dislocated finger. Mrs. Nathan was thereafter treated by other doctors.

Some months later, Gilbert Nathan, Harriet's husband, and a practicing attorney, informed Petitioner in a telephone call that he was going to bring a malpractice suit against one of the physicians who had treated his wife and that Petitioner would also be named a defendant.

Just short of two years after the injury, the Defendant-Respondents, Fred Benjamin and Stuart Shapiro, attorneys, filed a medical malpractice suit in the Circuit Court of Cook County naming Dr. Berlin, Dr. William Meltzer and Skokie Valley Community Hospital defendants, charging each of them with medical malpractice (sometimes herein referred to as the "Nathan case"). Prior to the preparation of the filing of that suit, the attorneys did not communicate in any way with any of the doctors who had treated Mrs. Nathan, nor did they attempt to do so. At the trial of this cause, Fred Benjamin, the attorney actively prosecuting Mrs. Nathan's suit, admitted that he had no evidence or information to support the allegations of medical malpractice which were made against Dr. Berlin in

Mrs. Nathan's complaint which he had drafted and filed. Likewise, Mrs. Nathan admitted that in consultation with her subsequently engaged physicians, there was no intimation that Dr. Berlin's services to her had in any sense been improper.

On October 22, 1975, shortly after the filing of the suit against him, Dr. Berlin filed suit in the Circuit Court of Cook County against Respondents. His suit was consolidated with Mrs. Nathan's medical malpractice suit by the Circuit Court. On the date set for trial, Harriet Nathan voluntarily dismissed her medical negligence suit against all defendants. The cause proceeded to trial on Dr. Berlin's amended complaint before a jury. At the conclusion of the evidence, the jury returned a verdict in favor of Dr. Berlin, awarding him Two Thousand Dollars ($2,000) actual damages and Six Thousand Dollars ($6,000) punitive damages. Also, the jury returned answers to special interrogatories finding that each of the defendants had been guilty of wilful and wanton conduct and without any reasonable or probable cause in filing their suit against Dr. Berlin.

On appeal, the Appellate Court of Illinois reversed. It held that the proper course of action which a wrongfully sued person must follow in Illinois to redress any injuries which he may have suffered as a result of such a lawsuit is under the common law action of Malicious Prosecution. It made no reference whatsoever to the facts adduced at the trial, but relied solely on the pleadings in the suit, holding that Dr. Berlin had not stated a cause of action. The Appellate Court held that in order to plead such a cause of action it must be alleged, in Illinois, (a) that the plaintiff in the prior suit had acted maliciously and without probable cause, (b) that the prior suit had terminated in favor of the

defendant therein (that is, the plaintiff in the subsequent action such as the case at bar), and (c) that the latter must be shown to have suffered "special injury" of a kind not necessarily found in any and all suits prosecuted to recover for like causes of action. Applying these highly restrictive and ancient common law standards, the Appellate Court held that Dr. Berlin had failed to plead that the prior cause had terminated in his favor (since instead it had been dismissed by Mrs. Nathan) or to plead that he had suffered "special injury." Such special injury was defined by the Appellate Court to include arrest of the person, seizure of his property and other elements and events scarcely capable of occurrence and proof in modern life. Notwithstanding the fact that Petitioner had pleaded that Respondents had charged and alleged in their complaint professional malpractice against him "with reckless disregard as to [their] truth or falsity", the Appellate Court held that such pleading was not sufficient to allege "malice."[5]

Petitioner filed his Petition for Leave to Appeal to the Illinois Supreme Court. That Court's denial of the said Petition, and of reconsideration, as set forth above, then followed.

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[5] This holding is obviously contrary to the definition of malice employed by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). Most recently, this Court has reaffirmed that malice has long been recognized to include an improper purpose, including "the [lack of] belief of the defendant in the truth of his statement, or upon the ill will which the defendant might have borne towards the defendant." *Herbert v. Lando*, ... U.S. ..... , ... S.Ct. ..... , 47 U.S. Law Week 4401, 4403 (1979).

REASONS FOR GRANTING THE WRIT

I.

BURGEONING FRIVOLOUS LITIGATION COMPELS THIS COURT'S CORRECTIVE INTERVENTION.

This case presents a question which goes to the very heart of our judicial system. The Petitioner proved to the satisfaction of a jury that the suit charging him with medical malpractice had been brought in a wilful and wanton manner without any reason or probable cause to believe that he had been guilty of the grave professional charges made against him. The effect of the decision by the Illinois Appellate Court, reversing the trial court judgment, is virtually to grant total immunity to all attorneys and litigants who commence legal proceedings no matter how irresponsible, frivolous or malicious they may be in their motivation and pleading. The Illinois Supreme Court, in refusing to grant Petitioner's Petition for Leave to Appeal, failed to recognize that the Appellate Court decision, measured in the context of present-day conditions, called into serious question Petitioner's Federal Constitutional right to court access as a matter of due process and equal protection of the laws.

As matters now stand, Petitioner has been deprived of any meaningful access to the Illinois courts. The decision of the Appellate Court sets attorneys and litigants in a separate category, apart from all others. It grants them as officers of the court immunity from any answerability for intentionally and recklessly inflicting injury upon another simply because they have done so under the mantle of "judicial process." Ironically, victims of such misconduct, like Dr. Berlin, are *denied* effective access

to the same Courts in which the wrong occurred, all in the name of upholding principles of open access to litigation!

In this Age of Litigation the civil law case backlogs of American courts have increased alarmingly in consequence of frivolous and unfounded suits all too often brought for their *in terrorem* settlement potential, as in the Nathan case. Yet, most state appellate courts have failed to superintend the correction of the problem. If the Writ of Certiorari is granted, Petitioner will show in his brief the statistics revealing how consistently, in instance after instance, they have reversed trial courts which sought to provide effective relief to victims of maliciously or frivolously filed lawsuits.

In short, it is Petitioner's position that attorneys and the litigants they represent—just as anyone else in our society—must be held answerable in courts of justice for inflicting grievous harm and injury on innocent persons. This is particularly true where the wrongdoers act in the extreme manner shown here. The great social cost of such frivolous litigation and the manner in which it is undercutting respect for the administration of justice, alone, warrant the intervention of this Honorable Court to provide a superintending and correcting influence.

II.

REVERSAL OF THE JUDGMENT FOR PLAINTIFF BY THE APPELLATE COURT GAVE RISE TO SUBSTANTIAL CONSTITUTIONAL QUESTIONS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

As will be shown under Heading III, Illinois has so severely limited and conditioned the tort of malicious prosecution that such cause of action is virtually non-

existent for persons like Dr. Berlin. Where an individual, such as Petitioner, has been injured by the wrongful, wilful, wanton and malicious prosecution of a civil suit charging him with professional misconduct, due process requires that he be provided a judicial remedy for that injury. A total denial of such a remedy is a denial of access to the courts, in violation of the due process and equal protection clauses of the Fourteenth Amendment.

The requirement of due process of law, as guaranteed by the Fourteenth Amendment, embraces those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45 (1932). This is so whether or not those principles are specifically dealt with in another part of the Constitution. *Id.* at 67; *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). Here we deal with the very essence of our concept of ordered liberty—the judicial system. Without that system none of the other rights are enforceable. There have been many situations in which it has been held that the procedures of state courts violate federal due process. The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend has long been regarded as a denial of due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). Due process of law, when applied to judicial proceedings, means a course of legal proceedings according to rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). It requires a proceeding which follows forms of law appropriate to the case, and

just to the parties affected. *Endicott Co. v. Encyclopedia Press*, 266 U.S. 285 (1924).

Due process must be determined "by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceedings appropriate to the nature of the case." *Anderson National Bank v. Luckett*, 321 U.S. 233, 246 (1944). The fundamental requirement of due process is an opportunity to be heard upon such notice and at such proceedings as are adequate to safeguard the right for which protection is invoked. *Louisville & Nashville R.R. v. Schmidt*, 177 U.S. 230 (1900). Procedural due process rights attach where state action condemns a person to "suffer grievous loss of any kind." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).

In *Shelley v. Kraemer*, 334 U.S. 1, 17 and 18, 92 L. Ed. 1161, 68 S. Ct. 836 (1948) this Court noted that the Fourteenth Amendment protections extend to the action of state courts as well as to other state infringements. The Court said:

> "It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.
>
> * * *
>
> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in

construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."

The right to be heard is "one of the most fundamental requisites of due process" (*Schroeder v. City of New York*, 371 U.S. 208, 212, 9 L. Ed. 2d 255, 259; 83 S. Ct. 279 (1962)). It is a settled principle, that a state must afford its citizens a meaningful opportunity to be heard (*Boddie v. Connecticut*, 401 U.S. 371, 377, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)). See also *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950); *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970); *Sniadach v. Family Finance Corp., supra*; *Armstrong v. Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965). A person is entitled "upon the most fundamental principles to a day in court . . . " (*Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423, 59 L. Ed. 1027, 35 S. Ct. 625 (1915)). This is because "fundamental fairness" (*Betts v. Brady*, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942) requires that when one's property rights are affected, he must be granted the right to be heard.

The right to obtain entry into the court system is an obvious prerequisite to the right to be heard. "When a person's good name, reputation, honor or integrity is at stake . . . notice and an opportunity to be heard are essential." (*Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L. Ed. 2d 515, 519, 92 S. Ct. 507 (1971)). There is no difference between the State's deprivation of property (*Fuentes v. Shevin, supra*), privileges (*Bell v. Burson*, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971)), or welfare benefits (*Goldberg v. Kelly, supra*), on the one hand, and a state's denial, on the other, of a right of action to a plaintiff who has been injured in reputation and profession, under the conditions presented in this case.

Certainly a person's interest in his good name, reputation, honor and integrity are as fundamental as the rights to privacy (*Griswold v. Connecticut, supra*), marriage-divorce (*Boddie, supra*), travel (*Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)), property (*Sniadach, supra*, and *Fuentes, supra*), and welfare benefits (*Goldberg v. Kelly, supra*). Consequently, this Court has held that a person's right to protect his privacy, good name and reputation from malicious invasion is paramount even to those First Amendment rights of the news media (*New York Times v. Sullivan, supra*). In the case at bar, the jury returned a verdict finding that the defendants had engaged in wilful and wanton conduct. Yet Dr. Berlin was refused a remedy and denied recovery of the trial judgment by the reversal by the Appellate Court and by the refusal of the Illinois Supreme Court to grant appeal.

As was said by this Court in *Boddie v. Connecticut, supra*, 401 U.S. at 379, "the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." There, this Court held that a state could not deny indigent individuals access to the courts for the purpose of dissolving marital relationships. This holding was based on the right to due process. What was said there applies here as well. When the state requires a defendant to appear and defend himself in court, the state must similarly grant him an adequate remedy for

harm which is done when it is found that there was an improper motive for hailing him into court.

It was also pointed out in *Boddie* that the state maintained an effective monopoly for resolution of disputes involving the marriage relationship: that, since man and wife could not mutually and privately agree to divorce without court sanction, denial of their access to the courts foreclosed their exercise of a possible right of divorce. So, too, here, the refusal of Illinois courts to afford a viable and actual remedy in the circumstances of the case at bar represents a one-sided monopolization of judicial machinery, to the prejudice of citizens such as Dr. Berlin. As Mr. Justice Black noted in his dissent with reference to certain petitions for certiorari pending at the time of the decision of *Boddie*, appearing in *Meltzer v. C. Buck LaCraw & Co.*, 402 U.S. 954, 957-958, 29 L. Ed. 2d 124, 92 S. Ct. 1624 (1971):

> " . . . The wrong that gives rise to a right of damages in tort exists only because the society's lawmakers have created a standard of care and a duty to abide by that standard. The alternatives to resort to judicial process in tort cases are negotiations and settlements, abandonment of recovery, private self-help, and perhaps insurance. With the exception of insurance, the alternatives are exactly the same as in a divorce case—negotiate a separation agreement, decide to continue a marriage relationship, or violate the law."

Petitioner is well aware that "consideration of what procedures due process may require under a given set of circumstances must begin with the determination of the precise nature of the government function involved, as well as of the private interest that has been affected by the government action". (*Cafeteria & Restaurant Workers' Union v. McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 1236, 81 S. Ct. 1743 (1961); *Goldberg v. Kelly*,

supra). However, there is no countervailing state interest in protecting those who maliciously file litigation which they know to be without foundation at the expense of the innocent victim. We are not dealing, here, with a case where a legitimate litigant's rights might be "chilled" by allowing a defendant to countersue simply because the original plaintiff did not prevail or even if he were simply chargeable with ordinary negligence.

If the law of Illinois, applicable to the wrongs and injuries of the type suffered by Dr. Berlin, is as arbitrary, capricious and unreasoned as would appear from the Appellate Court's statement of criteria for a cause of action, then such Illinois law must indeed violate all meaningful due process requirements. To illustrate, the first prerequisite announced by the Appellate Court was that Dr. Berlin needed to plead and prove that the Nathan case terminated in Berlin's favor, a requirement that really means that the control of Dr. Berlin's remedy was in the hands of Nathan and her attorneys. Thus, all that they needed to do to defeat Dr. Berlin's remedy and to immunize themselves against suit was to take a dismissal of the Nathan case before proceeding to trial, the thing that actually occurred!

Secondly, the Appellate Court's definition of "malice" is obviously wrong, constituting a wide departure, not only from *New York Times Co. v. Sullivan*, *supra*, and cases which have followed it, but also from any logical and reasonable interpretation of the pleadings in the case at bar concerning the wilful and wanton conduct of the defendants and that they had proceeded with reckless disregard as to the truth or falsity of the charges made against Dr. Berlin. As shown elsewhere in this brief, the third requirement of special injuries, when tested in our modern society, is an

arbitrary and virtually impossible burden of pleading and proof since most of the elements of the "special injury" known to the common law have long since ceased to exist or have become so infrequent in modern-day occurrence as to be virtually meaningless as operative criteria and constraints on the nature of injuries which may be the subject of recoverable damages.

For these reasons the Illinois Supreme Court clearly erred in failing to identify the substantial Federal Constitutional questions which emerged in the Appellate Court reversal; also in failing under its own rules and Supremacy clause considerations to grant an appeal of right to Dr. Berlin which would have afforded him the means of demonstrating that under proper interpretation of expanding and rational legal concepts there could exist an Illinois remedy and a way out of the amazing legal dilemma confronting him and others similarly situated.

The issuance of the Writ of Certiorari by this Honorable Court would have an immediate and salutory effect in confronting the problems of frivolous litigation, permitting an authoritative determination by the Illinois Supreme Court of the question whether there exists in Illinois civil law any viable or meaningful remedy for persons injured in privacy, reputation or otherwise in the manner presented by this case; also permitting a review by that Court to determine whether any such remedy as may exist can meet the due process and equal protection requirements of the Fourteenth Amendment.

Petitioner clearly recognizes that the orderly administration of justice necessarily requires open access to a state's courts for all who proceed in good faith to litigate proper causes. That necessary requirement, essential to the due administration of justice, can be upheld and advanced consistently with relief to Petitioner essential in the special circumstances of this case if he is to encounter anything other than a repeatedly closed door as he seeks a viable judicial remedy. While courts must remain open to all who have legitimate grievances, such, of course, was not the situation here presented. Petitioner submits that the courts of this nation must protect themselves against harassing litigation which has no basis or justification other than a design to set the stage for *in terrorem* settlement recoveries regardless of the harm or injury callously done to the privacy, reputation and rights of the victims singled out for legal assault. While the instant case does not confront the total problems facing judicial systems in the field of frivolous litigation, it does offer a major first step which would provide a proper bridge in seeking to uphold the competing demands for open access to the courts by the legitimate majority of litigants and their attorneys while affording access to the court, consistent with due process and equal protection, to those like Dr. Berlin who are maliciously wronged by those who initially misuse the privilege of access.

III.

THE ILLINOIS COURTS HAVE THE POWER, AS WELL AS THE DUTY, TO GRANT PETITIONER A MEANINGFUL REMEDY.

This case arises out of a medical setting. While this is not the only context in which frivolous suits are found, it is doctors who seem to be in the forefront of those who have sought to convince the courts that some relief be made available for injury inflicted by frivolous litigation

such as this. Implicit in the special findings of the jury is the unescapable fact that the Nathan suit was brought for nothing less than legal harassment—to play on the system where every suit, no matter how frivolous, has some settlement value. Even a baseless and unmeritorious suit must be defended at some cost to a defendant.

There can be no question that the filing of a lawsuit, especially against a professional, publicly charging him with dereliction in his professional duties, causes great harm to such an individual. The mere filing of such a suit in a court of record inevitably leads to impairment of reputation, mental distress, loss of time from business pursuits, and increase of malpractice insurance premiums or perhaps even cancellation of insurance. The personal effects upon such a professional person, his privacy, and reputation, are profound. The filing of such a suit works a significant change upon the physician's attitude toward his patients, to the point that he practices a kind of "defensive" medicine which is expensive to the patient and often counterproductive, adversely affecting the overall quality of medical services for everyone. In addition, there is an adverse impact upon the judicial system itself, in terms of increased numbers of suits which unduly burden court personnel and facilities. See "Physicians Counter-attack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions," 45 Fordham L.Rev. 1003, by Sheila Birnbaum.

The magnitude of the problem was set forth eloquently by Mr. Justice Underwood of the Illinois Supreme Court recently when he said:

> "I believe we have finally reached the point where the public can no longer or will no longer bear the economic burden of our present-day system of tort law. Automobile insurance rates have reached absurd heights, rapidly, and the overbearing cost of medical malpractice insurance with its attendant social ills, has become a matter of common knowledge. In some states, the so-called malpractice crisis has resulted in the closing of hospital emergency services, the withdrawal of insurance underwriters from the field, and the abandonment by some physicians of their chosen specialties." *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250, 10 Ill. Dec. 484, 499 (1977).

It is not so much the tort system itself, but the abuse of that system which has led to the problems cited by Mr. Justice Underwood. The courts certainly have the duty to find a remedy for that abuse. There is no question that many suits, not only against doctors, but against others as well, are brought for the sole purpose of inducing a settlement without any intention that the case be continued to a trial, since the plaintiff and his attorney know full well that at such trial they could not possibly hope to prevail. Often they are withdrawn on the eve of trial as in the voluntary dismissal of the Nathan case. However, the high costs of defending such a suit makes it probable that the defendant, often represented by an insurer, will settle in order to avoid costly and time-consuming litigation. The institution of such suits wilfully, wantonly and without cause is clearly against the policy of the law. Yet, such suits continue to multiply.

The courts have long held that an individual's reputation is entitled to respect and protection. Thus, Mr. Justice Stewart has said:

> " . . . the First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of law

> to redeem. Yet, imperfect, though it is, an action for damages is the only hope for vindication for redress the law gives to a man whose reputation has been falsely dishonored." *Rosenblatt v. Baer*, 383 U.S. 75, 92, 86 S. Ct. 669, 679 (1966, concurring opinion).

While that statement was made in the context of an action for defamation, the occasion on which the damaging statements are made should not control the result. Indeed, the fact that such statements are recklessly made in court proceedings gives them an indelibility which is not present elsewhere. Having been made in a legal proceeding, they are given more currency and weight. Their existence on the public record continues indefinitely. Being a matter of public record, they are subject to indefinite resurrection and repetition.

Physicians are particularly susceptible to being harmed by such statements. Under Illinois law they are subjected to mandatory disclosure and dissemination of the information contained in medical negligence suits filed against them. Ch. 73 Ill. Rev. Stats., § 767.19 requires that all suits alleging liability on the part of any physician for medically related injuries shall be reported to the Director of Insurance. He is mandated to maintain complete records of all such claims and report that information to the appropriate disciplinary and licensing agencies. Furthermore, the application for renewal of license from the Illinois Department of Registration and Education requires the physician to answer the following question: "Have any lawsuits been filed against you charging malpractice, fraud, or unethical conduct?" (P. Ex. 12) Thus, the Department of Registration and Education, for some purposes, equates an allegation of negligence against a doctor with deliberate and wilful wrongdoing.

These administrative requirements are specifically limited to medical personnel. Any other person who is charged with negligence or misconduct more serious, is not required to have that information maintained by any official department or agency of the State of Illinois. Yet, the mere filing of a suit against a physician, whether it have any validity or be made of whole cloth, is indelibly imprinted upon his record. The damaging effect of groundless malpractice suits upon the average doctor is apparent. The mere institution of a suit against him is sufficient to place him in jeopardy of further action by other official agencies of the State.

There is no doubt that the misuse of the courts has become a serious problem in the general administration of justice. This was recognized recently by this Court in a case involving the right of an individual to sue for damages under the Securities Laws of the United States. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740, 95 S. Ct. 1917 (1975), the Court expressed great concern about the danger of vexatious and unfounded litigation, recognizing that a complaint, "which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." The Court recognized that "the very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Id.*

The Circuit Court of Cook County and the jury recognized this. The Appellate and Illinois Supreme Courts did not. The Appellate Court explicitly, and the Illinois Supreme Court by its silent acquiescence,

relegated Petitioner to an ancient common law remedy which exists in theory only.

Illinois is in the minority in requiring that a malicious prosecution plaintiff plead and prove "special damages" in order to make out a cause of action. Indeed, that view is a perversion of the English rule. The requirement under the English rule that special injury be shown before malicious prosecution will lie is based upon the premise that in the prior litigation the prevailing party would be granted his full costs and attorney's fees and thus would be made largely whole for any wrong done him in that litigation. 25 Halsbury, The Laws of England, § 717 (3d Ed. 1958); 52 Am. Jur. 2d Malicious Prosecution § 9 (1970). Such recoveries were not carried forward in the Illinois law.

Any protection purportedly given by the present cause of action for malicious prosecution in Illinois is illusory. An analysis of such cases brought in Illinois since 1848 demonstrates that fact most clearly. There are 191 reported decisions in Illinois dealing with malicious prosecution. The great majority of them were determined in favor of the defendant. A breakdown of those cases shows the following:

Ruling for Defendant in Circuit Court—affirmed on appeal	57
Ruling for Defendant in Circuit Court—reversed and remanded	14
Ruling for Plaintiff in Circuit Court—reversed and remanded	38
Ruling for Plaintiff in Circuit Court—reversed outright	41
Ruling for Plaintiff in Circuit Court—affirmed on appeal	41

Thus, in only 21% of those cases for malicious prosecution which have been reported has a plaintiff been able

to obtain and sustain a recovery. Of those 41 cases where the plaintiff has ultimately prevailed, 33 have arisen out of an underlying criminal suit. Only eight have arisen out of an underlying civil suit—4% of the malicious prosecution suits decided on appeal.

Thus, it will be seen that, in Illinois, the old common law malicious prosecution cause of action simply gives no substantial protection to those who are damaged by the wrongful filing of litigation against them. It is a dead letter, in fact and in legal utility.

"Special injury" situations in which a person's property may be seized in a judicial proceeding prior to final judgment against him have been shrinking steadily. Thus, for example, the Court has held that replevin statutes which authorize seizure of a person's possessions without a prior hearing where the defendant has an opportunity to be heard are violative of due process. *Fuentes v. Shevin, supra.* In fact, the instances of direct interference with a person's property by virtue of judicial proceedings have shrunk almost to the vanishing point, except where it has been held after a full determination that such seizure is justified. In effect, therefore, to hold that special damages must be demonstrated before a malicious prosecution cause of action may be brought is to hold that no malicious prosecution suit may arise out of a civil proceeding.

It is manifest that this condition does not provide the public with any meaningful protection against wrongfully filed suits. Not only must a cause of action serve to protect the individual, but equally it must protect the interests of society as well.[6] Thus it has been said:

[6] Suits such as Petitioner's will not chill the rights of the honest litigant. This Court has stated recently that there is no policy or constitutional inhibition against chilling knowing falsity:

(Footnote continued on following page)

"The malicious prostitution of legal remedies to subserve unworthy personal ends is not only an injury to the victim of the particular persecution, but also to society at large, if it is suffered to go unwhipped of justice. If the law will not punish such conduct, public confidence in the merits of our system of jurisprudence must inevitably be shaken, and the courts themselves will seem to have forsaken their high function as protectors and vindicators of invaded rights, and to have become, instead, the accomplices of evil men." *Kolka v. Jones*, 71 N.W. 558, 565 (N.D. 1897).

To argue, as the Illinois Appellate Court did, that relaxation of the strict common law requirements of special damages will chill the honest litigant, and deter the bringing of meritorious claims is to assume a result which has no empirical basis. The fact that the Illinois rule is a minority one in this area goes far to demonstrate that fallacy. Certainly, there is no reason to believe that those states in the majority, which do not require such a showing of "special injury" have found this to be a problem or consequence of adopting a meaningful remedy. There is nothing to indicate a trend toward the minority view which would occur if that were the fact. Instead, the number of suits such as the instant one which are being filed show just the

[6] *continued*

"But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. '[T]here is no constitutional value in false statements of fact.' *Gertz v. Robert Welch, Inc.*, 418 U.S., at 340."

Herbert v. Lando, ... U.S. ..... , ... S.Ct. ..... , 47 U.S. Law Week, 4401, 4405 (1979). No honest and responsible litigant need fear a chilling of his rights by the existence of a cause of action which penalizes only wilful and wanton conduct.

opposite—that the number of spurious suits is constantly increasing to the detriment of all society.

To fail to respond to such a situation is not merely to deny those such as Petitioner due process of law; it is also to deny our unique heritage of the common law. The glory of the common law is its ability to accommodate and respond to changing societal values. A slavish rote adherence to orthodox rules drawn arbitrarily from the distant past inhibits that capacity for change which is necessary in a changing society. The Illinois Supreme Court itself has said:

"Every person owes to all others a duty to exercise ordinary care to guard against injury which may naturally flow as a reasonably probable and foreseeable consequence of his act, and the law is presumed to furnish a remedy for the redress of every wrong. The duty to exercise ordinary care to avoid injury to another does not depend upon contract, privity of interest, or the proximity of relationship, but extends to remote and unknown persons." *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 622, 126 N.E.2d 836 (1955).

The proper approach was well stated by Justice Linn of the Illinois Appellate Court, concurring in *Walton v. Norphlett*, 56 Ill. App. 3d 4, 371 N.E.2d 978, 13 Ill. Dec. 886, 890 (1977):

"It remains for the judiciary to abandon outmoded theories of liability and to bring the law into focus with modern social mores and humanitarian values. In the final analysis, the law, to remain an instrument of justice, must be functional and responsive to societal needs."

In other types of cases, the Illinois Supreme Court has wisely recognized this overriding policy. In *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 26, 163 N.E.2d 89, 96 (1959), the Court said:

> "The doctrine of *stare decisis* is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present-day concepts of right and justice."

The Illinois Supreme Court has also taken that approach in many recent cases. Thus, in *Darling v. Charleston Community Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), charitable immunity was abolished. In *Suvada v. White Motor Co.*, 32 Ill. 2d 612 (1965), strict liability for damage as a result of defective products was instituted.

More recently, that court said:

> "Where this court has created a rule or doctrine which, under present conditions, we consider unsound and unjust, we have not only the power but the duty to modify or abolish it." *Skinner v. Reed-Prentice Division Package Machinery Company*, 70 Ill. 2d 1, 374 N.E.2d 437, 15 Ill. Dec. 829, 834 (1978).

Despite the clear import of the holdings of numerous cases, the Illinois Appellate and Supreme Courts have refused to grant Petitioner the same rights granted to others suffering actual and generally cognizable damages. They have closed their doors to litigants such as Dr. Berlin who are damaged by the misuse and perversion of the judicial process. The result of such holding is to carve out an exception to the general rule of liability guaranteed by the due process clause and the equal protection clause. It grants immunity from suit to a particular and favored class of citizens. It is of particular concern when the privileged class is made up of attorneys-at-law.

An attorney has a unique position in the law. Only he may represent others before the court. He has a duty, therefore, not only to his clients, but to the judicial system itself, to act properly in discharging that right which carries with it heavy responsibility. It is not only his reputation which he sullies when he needlessly inflicts harm upon others by knowing misuse of the judicial system, but the reputation of the legal profession, as a whole. *People, ex rel, Cutler v. Ford*, 54 Ill. 520, 522 (1870). So apparent is this duty that the Code of Professional Responsibility promulgated by the American Bar Association specifically provides:

> "A lawyer shall not file suit . . . when he knows or when it is obvious that such actions would serve merely to harass or maliciously injure another." D.R. 7-102(A)(1).
>
> "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." E.C. 7-10

These statements of ethical concern must not be allowed to become meaningless platitudes. It makes no sense to say that an attorney may be disciplined by courts for violating such ethical canons, but may not be held accountable to the one whom his actions have clearly harmed. Yet, this is what the courts of Illinois have done. In refusing to take jurisdiction over this case and hear the arguments of Petitioner, as mandated by its own rules, the Illinois Constitution and the Supremacy clause of the Constitution of the United States, the Illinois Supreme Court has failed and twice declined to recognize the important Federal Constitutional issues raised by this case. Only this Court is now available to right that wrong.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Honorable Court to grant its Writ directed to Illinois Supreme Court (or, alternatively, to the Illinois Appellate Court if deemed more appropriate), (a) noting the emergence in the action and opinion of the Appellate Court of substantial Federal Constitutional questions of due process and equal protection, (b) directing the Illinois Supreme Court to grant appeal and review as a matter of right to determine in that Court whether present Illinois law affords meaningful remedy consistent with due process and equal protection to Petitioner and all others similarly situated, and (c) for such other relief and remedy in the premises as may be available or required as a matter of constitutional right or privilege.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois, First District

MR. JUSTICE ROMITI delivered the opinion of the court:

This case involves another of the many retaliatory actions which physicians in Illinois and other states who have been sued for malpractice are filing against both the original plaintiff and the original attorney. In this case the original plaintiff's husband was sued as well. In accord with the other cases in Illinois and elsewhere, we hold that the complaint which failed to allege either malicious intent or special damages failed to state a cause of action. We also hold that the court correctly dismissed the physician's claim against the husband for barratry.

The pleadings reveal that on October 1, 1973 Harriet Nathan entered the Skokie Valley Community Hospital complaining of an injury to the little finger of her right hand. An x-ray was taken under the supervision of Dr. Berlin, a radiologist on the staff of the hospital. Dr. Berlin read the film as revealing a dislocation of the finger. Dr. Meltzer then applied treatment appropriate for a dislocation. In November, another x-ray was taken. This x-ray disclosed that there had been a chip fracture of that finger.

On September 11, 1975, about two weeks before the statute of limitations would have run, Harriet Nathan, through her attorneys, Benjamin and Shapiro, filed suit against Dr. Berlin, Dr. Meltzer and the hospital alleging various acts of malpractice in the taking of the x-rays and the making of the diagnosis. Dr. Berlin thereupon filed a suit

against Mr Nathan (at whose specific instance and request, he alleged, the malpractice suit was specifically brought), Mrs. Nathan and her attorneys Benjamin and Shapiro. In Count I of that suit he alleged that all four defendants owed him a duty to refrain from willfully and wantonly bringing suit against him without having reasonable cause to believe that he had been guilty of malpractice; that the defendants instead, although having no cause whatsoever to believe he had been guilty of malpractice, had instituted suit with reckless disregard as to the truth or falsity of the allegations. Specifically, Dr. Berlin in Count I complained that Benjamin and Shapiro had acted willfully and wantonly and without probable cause since they had not, before filing suit, obtained an opinion from another physician as to the quality of the x-rays and the correctness of their interpretation thereof; and moreover, that the ad damnum ($125,000), which bore no reasonable relationship to the injuries allegedly sustained, was devised to intimidate Dr. Berlin and might affect his ability to procure malpractice insurance at reasonable rates. Dr. Berlin in Count I specifically alleged that Harriet Nathan brought suit willfully and wantonly and without probable cause in that she at no time prior to suit obtained from another physician an opinion as to the quality of the x-rays, the correctness of their interpretation or an opinion whether the condition of which she complained resulted from malpractice by either Dr. Berlin or Dr. Meltzer. Dr. Berlin further alleged that the Nathans had been told by another orthopedic surgeon, prior to the institution of the suit, that no malpractice had occurred but that they willfully and wantonly incited and instituted the suit in retribution for real or imagined discourtesies to them by Dr. Meltzer.

Finally, Dr. Berlin complained that as a result of these actions his reputation in his profession had been attacked, he had suffered mental anguish, he had been caused to devote much time to the defense of the malpractice suit and, that because of the institution of the suit, he would be required to pay increased premiums for his malpractice insurance coverage. In Count II, Dr. Berlin claimed that Gilbert Nathan, knowing the malpractice suit to have no merit but intending to extort money either from Dr. Berlin or his malpractice insurance company, wickedly and willfully caused this suit to be brought and caused Harriet Nathan to prosecute said suit, contrary to the Illinois barratry statute. Ill. Rev. Stat. 1975, ch. 13, par. 21.

In Count III, Dr. Berlin alleged that the attorneys, Benjamin and Shapiro, had a duty to the plaintiff not to file the malpractice lawsuit without reasonable evidence to support the allegations therein since, as attorneys, they were particularly aware of the time and expense that litigation causes and could foresee the harm an unfounded lawsuit could cause to the reputation and mental well-being of a physician; that by filing the complaint without reasonable cause, the attorneys fell below the standard of care required of attorneys in the performance of their professional duties in good faith and in a legal manner and were negligent towards Dr. Berlin.

Count II was dismissed by the trial court upon Gilbert Nathan's motion before trial. This suit was consolidated with the original suit for discovery and for trial.

On May 27, 1976 the original malpractice suit was voluntarily dismissed, with prejudice, on the motion of Harriet Nathan. The action on the countersuit then proceeded

to trial. At the close of the trial the jury was not instructed as to the elements involved in a suit for malicious prosecution but were solely instructed as follows: as to Count I that the plaintiff claimed that the conduct of the defendants was willful and wanton in that a medical malpractice complaint was filed against him when there was no reasonable cause to believe that such a cause of action existed and that the defendant's act was a proximate cause of his damages (all of which the defendants denied); as to Count II (originally Count III) that the plaintiff claimed that he sustained damages while exercising ordinary care and the defendants Benjamin and Shapiro were negligent in filing and prosecuting a lawsuit without taking proper steps to determine that there was reasonable cause to believe any cause of action existed and that this was a proximate cause of his damage (all of which the defendants denied). The jury was also instructed that in filing a lawsuit an attorney must possess and apply the knowledge, skill, care and regard for potential defendants that is ordinarily used and shown by reasonably well-qualified attorneys in the locality. And finally, the jury was instructed that the defendants had a duty before and at the time of the occurrence to refrain from willful and wanton conduct which would endanger the rights of the plaintiff.

The jury found all four defendants guilty of willful and wanton misconduct proximately causing injury to Dr. Berlin and awarded Dr. Berlin $2,000 in compensatory damages and $6,000 in punitive damages.

All the parties have appealed.

I.

The *amicus curiae* has argued that the jury verdict should be upheld since the jury properly found defendant guilty of malicious prosecution. We disagree since we find that the plaintiff's complaint was not sufficient to state a claim for malicious prosecution against any of the defendants, and the instructions to the jury certainly did not submit a claim for malicious prosecution.

A.

Tort litigants, such as the Nathans, may be held liable for malicious prosecution. (25 Illinois Law and Practice *Malicious Prosecution* §§ 1 et seq. (1956).) However, since the law does not look with favor on such suits (*Schwartz* v. *Schwartz* (1937), 366 Ill. 247, 8 N.E.2d 668; *Carlyle* v. *Carlyle* (1960), 28 Ill. App. 2d 90, 170 N.E.2d 790; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E. 2d 685), there are strict limitations on the availability of such suits. Suits for malicious prosecution cannot be maintained in Illinois unless the plaintiff alleges and proves that the plaintiff in the original tort action acted maliciously and without probable cause (*Hill Co.* v. *Contractors' Supply Co.* (1911), 249 Ill. 304, 94 N.E. 544; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685); that the prior cause terminated in the plaintiff's favor (*Schwartz* v. *Schwartz* (1937), 366 Ill. 247, 8 N.E.2d 668; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685); and that some special injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action was suffered. (*Schwartz* v. *Schwartz* (1937), 366 Ill. 247, 8 N.E.2d 668; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.

2d 685; *Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480.) It is clear that in this case neither of the last two elements was pleaded and, even if we liberally construe the complaint to allege that the suit was brought maliciously and without probable cause by the Nathans, that issue was not submitted to the jury.

B.

Special damages as defined by the Illinois Supreme Court in *Schwartz* v. *Schwartz* are those not necessarily resulting in any and all suits prosecuted to recover for like causes of action. The only damages that Dr. Berlin claimed he suffered are (1) his reputation in his profession has been attacked; (2) he has suffered mental anguish; (3) he has been forced to spend time on the defense; (4) he will be required to pay increased insurance premiums. The first three items of damage claimed are so patently common to all litigation that no discussion is warranted. We agree, moreover, with the Illinois court in *Pantone* that an increase in insurance premiums, while perhaps not a necessary result of the litigation, is, assuming the allegation is anything more than pure speculation, an item necessarily incident to all malpractice cases and not therefore amounting to damages suffered specially by Dr. Berlin as distinct from other physicians who have been defendants in malpractice suits.

The defendant and *amicus curiae* both, however, contend that the requirement of special damages is unreasonable and should be abolished. First of all, we have no authority to overrule the Illinois Supreme Court. (*Chicago Title & Trust Co.* v. *Guarantee Bank* (1978), 59 Ill. App. 3d 362, 16 Ill. Dec. 649, 375 N.E.2d 522.) But in any event, we agree with *O'Toole* v. *Franklin* (1977), 279 Or. 513, 569 P.

2d 561 and *Ammerman* v. *Newman* (D.C. 1978), 384 A.2d 637 which rejected precisely the same argument. As the latter court stated at 384 A.2d 641:

> "Appellant effectively concedes that he has suffered no injury that would not normally occur as a consequence of a malpractice suit, and appears to recognize that the authority in this jurisdiction does not support his claim. He seeks to avoid the application of the rule by arguing that it is inequitable in the context of medical malpractice actions. He contends that the fact that such actions are particularly harmful to the reputations and livelihood of physicians calls for a modification of the rule with respect to them. The purpose of the special injury rule, however, is to strike a balance between allowing free access to the courts for the vindication of rights without fear of a resulting suit, and the undue exercise of such right. *Davis* v. *Boyle Bros.*, D.C. Mun. App., 73 A.2d 517, 521 (1950). Appellant's argument, if accepted, would upset that delicate balance. The nature of his profession, given its profound impact on the lives of those with whom he deals, cannot be allowed to insulate him from potential liability. In order to maintain a free access to the courts by persons with grievances who might otherwise be restrained from seeking redress because of their fear of liability should they fail, the special injury rule has consistently been upheld.
>
> The limitation is sound. When disputes reach the litigious stage, usually some malice is present on both sides. Friendly tort suits are not common. Nor is existence or want of probable cause always easy to determine until the event of the litigation is known. Some margin of safety in asserting rights, though they turn out to be groundless and their assertion accompanied by some degree of ill-will, must be maintained.

Otherwise litigation would lead, not to an end of disputing, but to its beginning, and rights violated would go unredressed for fear of the danger of asserting them. [*Melvin* v. *Pence*, 76 U.S. App. D.C. 154, 157, 130 F.2d 423, 426 (1942).]"

C.

The complaint against the Nathans failed to allege that the malpractice action had been terminated in plaintiff's favor, obviously for the simple reason that it had not been terminated when the complaint was filed, although it was terminated before the counterclaim was actually tried. Nevertheless, if we were to permit such an action under these circumstances, we would create the incongruous situation of permitting the filing of a suit before the cause of action existed or the statute of limitations commenced to run. *Babb* v. *Superior Court* (1971), 3 Cal. 3d 841, 92 Cal. Rptr. 179, 479 P.2d 379.

D.

Basically, the complaint against the Nathans merely alleges that their conduct was willful and wanton. Willful and wanton conduct does not amount to malice. (Compare *Myers* v. *Krajeska* (1956), 8 Ill. 2d 322, 134 N.E. 277.) However, a suit brought for an improper motive may be malicious (*Carlyle* v. *Carlyle* (1960), 28 Ill. App. 2d 90, 170 N.E.2d 790), and Dr. Berlin did allege that the Nathans brought suit solely in retribution for the real or imagined discourtesies of Dr. Meltzer. But, the plaintiff clearly abandoned any attempt at trial to prove a cause of action against the Nathans for malicious prosecution since in the instructions submitted to the jury, the jury was solely instructed as to willful and wanton misconduct and was not instructed as to the elements of a claim for malicious prosecution. The

burden was on the plaintiff to submit the issue (35 Illinois Law and Practice *Trial* §251 (1958)); having failed to do so he cannot contend on appeal that he had a claim for malicious prosecution. And, in all fairness to the plaintiff, he has not made such a claim; only *amicus curiae* has done so.

E.

A suit for malicious prosecution can be brought against an attorney since an attorney cannot always justify himself merely by showing he followed his client's instructions. (*Burnap* v. *Marsh* (1852), 13 Ill. 535.) If an attorney, acknowledging there is no cause of action, and knowing this dishonestly and for some improper purpose files suit, or even if an attorney merely acts knowing that his client has no just claim and that his client is actuated by illegal or malicious motives, the attorney may be held liable for malicious prosecution. *Burnap* v. *Marsh* (1852), 13 Ill. 536; Annot., 27 A.L.R.3d 1113 at 1129-1133 (1969).

However the plaintiff's complaint was totally insufficient to support a claim against the attorneys for malicious prosecution. First, there is no allegation that the attorneys acted maliciously or knew that their client did so. As we noted previously, willful and wanton conduct does not constitute malicious conduct, particularly where, as here, no improper motive of any kind on the part of the attorneys is suggested. Basically, the plaintiff simply complains that the defendants did not get another doctor's opinion before filing suit. But the undisputed facts are that the finger was fractured and that this fracture was not discovered for several weeks. Perhaps more investigation before filing suit would have been prudent, but as the Louisiana court

remarked in *Spencer* v. *Burglass* (Ct. of App. 1976), 337 So.2d 596 at 599, 600:

> "There are no factual allegations to suggest that when defendant filed his client's suit he knew the allegations were false or that he had a reckless disregard as to whether the allegations were false or not. On the contrary, plaintiff's allegations are to the effect that defendant simply did not know enough about the case at the time he filed it and now in retrospect plaintiff would say this was malice on defendant's part. If that be so many a successful lawsuit would never have been or never would be filed because oftentimes the case comes to the attorney just prior to prescription date and the evidence is not discovered and developed until after the suit is filed. We therefore conclude that the allegation of 'frivolously filing suits' cannot be construed as an allegation of malice.
>
> • • •
>
> Finally, there is the allegation that defendant failed to obtain 'competent medical advice,' etc. Does this constitute an allegation of malice? It would seem that an affirmative answer to this query would mean that before the attorney brings a malpractice case to trial he must find a medical person who supports the attorney's theory or that of his client, who is willing to testify favorably and who is 'competent' by someone's (plaintiff's?) standards. If he finds no such person but he nevertheless, places whatever evidence he can before the court perhaps relying on circumstantial evidence, reasonable inferences and common sense and perhaps realizing that he will probably lose, he runs the risk of having his conduct branded as malicious. When the bald allegation in question is considered in this light it can hardly be construed as one alleging malice. At worst, the allegation is that defendant went to trial with a poor case and got his just desserts, to

> wit, he lost. If that constitutes malice, the courtrooms are full of malicious attorneys. This we cannot accept."

Furthermore, as we discussed earlier, the complaint was insufficient since no special damages were alleged. And finally, there is no allegation that the malpractice case was terminated favorably to the present plaintiff before the complaint was filed. In fact it is conceded that at the time of filing, the original tort action was still pending. As the court observed in *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 820, 14 Ill. Dec. 489, 492, 372 N.E.2d 685, 688, to permit the filing of such an action against the attorney prior to the termination of the initial malpractice action "would tend to drive a wedge between the malpractice plaintiff and his attorney; the attorney may be diverted from properly preparing the client's malpractice case by the necessity for readying his own defense to the physician's countersuit, and may, in some cases, even be forced to withdraw from the malpractice action." This we cannot permit.

II.

It is clear, therefore, that Dr. Berlin's complaint is insufficient to allege a cause of action for malicious prosecution. Indeed, he has not on appeal contended that it is. What he does claim, contrary to the well-established law in Illinois that "a person is not liable for bringing any suit, criminal or civil, • • •, if the court had jurisdiction of the subject matter and the parties, unless he acts maliciously and without probable cause" (*Hill Co.* v. *Contractors' Supply Co.* (1911), 249 Ill. 304, at 310, 94 N.E. 544, at 546), is that he should be able to recover against all of the defendants for the willful and wanton filing of a frivolous lawsuit. But *Hill* still represents the state of the law in Illinois

(*Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480.) Furthermore, since "it takes a 'special injury' to recover for the *malicious* pursuit of an unfounded civil action, it would be incongruous to base a recovery on mere carelessness without the same requirement." (*O'Toole* v. *Franklin* (1977), 279 Or. 513, 569 P.2d 561, at 566.) Likewise, we agree with the court in *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685 that the failure to plead the outcome of the malpractice action would constitute a fatal defect to Dr. Berlin's complaint, even if he were correct in his contention that malicious prosecution is not the sole course of action available to a party who is put to the expense and vexation of defending a baseless lawsuit. The considerations underlying the requirement that a complaint for malicious prosecution plead the favorable outcome of the prior cause are, in effect, broader than the rule itself. Indeed, we hold that permitting the filing of such a complaint against the attorney before the termination of the original suit would be against public policy since it would tend, as we pointed out earlier, to create a conflict of interest between attorney and client.

A.

Dr. Berlin, however, contends that Article I, Section 12 of the Illinois Constitution requires the creation of a new cause of action. Section 12 reads as follows:

> "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."

It is well established in Illinois that Section 12, like its predecessor Section 19 of Article II of the 1870 Illinois

Constitution,[1] is "an expression of a philosophy and not a mandate that a 'certain remedy' be provided in any specific form or that the nature of the proof necessary to the award of a judgment or decree continue without modification." (*Sullivan* v. *Midlothian Park District* (1972), 51 Ill. 2d 274, at 277, 281 N.E.2d 659 at 662.) So long as some remedy for the alleged wrong exists, Section 12 does not mandate recognition of any new remedy. (*Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480.) As recognized by the court in *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685, in this type of case one may file an action for malicious prosecution, or perhaps for abuse of process, and even if those two remedies are not applicable, he may, if put to the burden of defending allegations made without reasonable cause, recover attorney's fees under section 41 of the Civil Practice Act (Ill. Rev. Stat. 1977, ch. 110, par. 41), by motion in the original action. He may also, though we doubt it is much comfort to the plaintiff, in an appropriate case, be instrumental in the institution of disciplinary proceedings against the offending attorney. Section 12 mandates no additional remedies. (*Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480.) The mere fact that the relief provided by these remedies is limited (*Cunningham* v. *Brown* (1961), 22 Ill. 2d 23, 174 N.E.2d 153), or that the plaintiff is unable to meet the burden of proof required does not dictate the creation of new remedies.

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[1] Section 12 made two changes. One was to add protection against invasion of privacy. The other was the substitution of the word "shall" for the words "ought to." However it is clear from the legislative history that the latter change was not "to create any new rights or to limit any rights." 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1491.

The failure to state a cause of action cannot be cured by alleging that the plaintiff should have a remedy as provided in Section 12. Constitutional rights are not infringed where an insufficient complaint is dismissed. (*Belmar Drive-In Theatre* v. *Illinois State Toll Highway Commission* (1966), 34 Ill. 2d 544, 216 N.E.2d 788; *Zamouski* v. *Gerrard* (1971), 1 Ill. App. 3d 890, 275 N.E.2d 429.) And as observed in *O'Toole* v. *Franklin* (1977), 279 Or. 513, 569 P. 2d 561 at 565 "it would be ironic to derive a looser test of malicious prosecution from a constitutional guarantee of access to the courts."

B.

We are not persuaded by the plaintiff's argument that in light of the recent rise in the volume of malpractice litigation, including the filing of frivolous malpractice suits purely for their settlement value, public policy demands the creation of a cause of action to protect the courts from their misuse and the physician from the resulting harm.

First of all, we agree with the court in *Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480 that it is doubtful that the creation of this new remedy would reduce the amount of litigation; it is far more likely that litigation would be increased since each successful defendant would bring suit against the original plaintiff. (See also *Smith* v. *Michigan Buggy Co.* (1898), 175 Ill. 619, 51 N.E. 569.) But even if the creation of this new remedy would reduce congestion in the courts, the price the public would have to pay for the benefit is too great. It is the overriding public policy of Illinois that potential suitors must have free and unfettered access to the courts. (*Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E.2d 480; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E. 2d 685.) The Illinois courts have consistently adhered to the established policy "that the courts should be open to litigants for settlement of their rights without fear of prosecution for calling upon the courts to determine such rights" (*Franklin* v. *Grossinger Motors Sales, Inc.* (1970), 122 Ill. App. 2d 391, at 396, 259 N.E.2d 307, at 309, *leave to appeal denied, cert. denied,* 403 U.S. 911 (1971)), and have never deviated from the philosophy expressed in *Smith* v. *Michigan Buggy Co.* (1898), 175 Ill. 619 at 628, 51 N.E. 569, at 571 that:

> "[I]t must be remembered that the courts are open to every citizen, and every man has a right to come into a court of justice and claim what he deems to be his right without fear of being prosecuted for heavy damages. If such actions are allowed, it might oftentimes happen that an honest suitor would be deterred from ascertaining his legal rights through fear of being obliged to defend a subsequent suit, charging him with malicious prosecution."

Thus, our courts have consistently applied, and refused to lessen, the elements necessary in proving a case for malicious prosecution. See *Schwartz* v. *Schwartz* (1937), 366 Ill. 247, 8 N.E.2d 668; *Smith* v. *Michigan Buggy Co.* (1898), 175 Ill. 619, 51 N.E. 569; *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685; *Pantone* v. *Demos* (1978), 59 Ill. App. 3d 328, 16 Ill. Dec. 607, 375 N.E. 2d 480; *Westphal* v. *Fridly* (1975), 34 Ill. App. 3d 611, 339 N.E.2d 30; *Franklin* v. *Grossinger Motor Sales, Inc.* (1970), 122 Ill. App. 2d 391, 259 N.E.2d 307, *leave to appeal denied, cert. denied,* 403 U.S. 911; *Caspers* v. *Chicago Real Estate Board* (1965), 58 Ill. App. 2d 113, 206 N.E.2d 787.

While it is true that, as the defendant contends, "no man has a constitutional right to maintain vexatious or harassing litigation," (*Guttman* v. *Guttman* (1969), 65 Ill.App.2d 44, at 53, 212 N.E.2d 699, at 704), nevertheless "[s]ome sort of balance has to be struck between the social interests in preventing unconscionable suits and in permitting honest assertion of supposed rights. These interests conflict because a suit which its author thinks honest may look unconscionable to a jury." *Soffos* v. *Eaton* (1945), 80 U.S. App. D.C. 306, at 307, 153 F.2d 682 at 683; *O'Toole* v. *Franklin* (1977), 279 Or. 213, 569 P.2d 561 at 564. Since, as the court in *Lyddon* pointed out, the very purpose of a court of law is to determine whether an action filed by a party has merit, it would be incongruous to hold a party liable in tort for negligently or even wantonly failing to determine in advance that which ultimately only the court can determine.

And as pointed out in *Lyddon* v. *Shaw* at 56 Ill. App. 3d 822, 14 Ill. Dec. 494, 372 N.E.2d 690:

> "These considerations apply with equal force, not only to a party litigant, but to his counsel, (see *Spencer* v. *Burglass* (1976), La. App., 337 S.2d 596), since a litigant's free access to the courts would frequently be of little value to him if he were denied counsel of his choice by a rule which rendered attorneys fearful of being held liable as insurers of the merits of their client's case, and therefore unwilling to undertake representation in close or difficult matters."

See also *Norton* v. *Hines* (1975), 49 Cal. App. 3d 917, 123 Cal. Rptr. 237.

Indeed, we believe it would be contrary to public policy for us to hold that an attorney has a duty to an intended defendant not to file a weak or perhaps "frivolous" lawsuit since we would be creating an insurmountable conflict of interest between the attorney and the client. The attorney owes a duty to his or her client to present the client's case vigorously in a manner as favorable to the client as the rules of law and professional ethics demand. (*Norton* v. *Hines* (1975), 49 Cal. App. 3d 917, 123 Cal. Rptr. 237.) When a tort action is brought he has but one intended beneficiary, his client; the adverse party is certainly not an intended beneficiary of the adverse counsel's client. Thus, even in states extending the attorney's responsibility and liability to intended beneficiaries of the client's conduct, such as intended legatees under a will, no liability to the adverse party sued by the client has been found absent malicious prosecution. *Norton* v. *Hines* (1975), 41 Cal. App. 3d 917, 123 Cal. Rptr. 237.

C.

Furthermore, we are not convinced by Dr. Berlin's argument that since the defendant attorneys are officers of the court and can be disciplined by the court, they should be held liable in tort for breach of Disciplinary Rule 7-102 and Ethical Consideration 7-10 of the Illinois Code of Professional Responsibility (1970). First of all, the Code is not "designed solely to prevent the risk of the plaintiff's being piqued at being sued. That would be an oversimplification of the ethical complexities which govern the lawyer's conduct to his client, the court and the public." (*Spencer* v. *Burglass* (La. App. 1976), 337 So.2d 596 at 601.) Sec-

ondly, we see no violation of the Code. The provisions relied on by Dr. Berlin read as follows:

> Illinois Code of Professional Responsibility, D.R. 7-102(A)(1) (1970):
>
> "... a lawyer shall not: (1) File a suit * * * when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."
>
> Illinois Code of Professional Responsibility, E.C. 7-10 (1970):
>
> "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."

As we have already noted, plaintiff in his complaint at no time alleged that the defendant attorneys filed the action knowing it would serve merely to harass or maliciously injure another. All he alleged was that they failed to make the investigation he, Dr. Berlin, felt was proper instead of relying on their client's statement. But, to reiterate, "if that constitutes malice, the courtrooms are full of malicious attorneys." (*Spencer* v. *Burglass* (La. App. 1976), 337 So. 2d 596 at 600.) And the injunction to avoid infliction of needless harm can hardly be interpreted as an injunction against the filing of weak lawsuits. The attorney is liable if he is guilty of malicious prosecution, that is enough. To create liability only for negligence, for the bringing of a weak case, would be to destroy his efficacy as advocate of his client and his value to the court, since only the rare attorney would have the courage to take other than an "easy" case.

D.

We are aware that, as Dr. Berlin contends, some doctors are being flooded with lawsuits; that all at least suffer the loss of time, fees, and the possibility of an increase in insurance premiums, or even the cancellation of their malpractice policies. We are also aware that the cost of the litigation can be great, whether borne by the doctor himself or by his insurance company. As to this latter problem, we note that the legislature has already responded, to a certain extent, since in 1976 it amended section 41 of the Illinois Civil Practice Act, which subjects a party pleading false allegations to the payment of attorney's fees, by eliminating the former requirement that the allegations be shown to have been made in bad faith, and substituting a requirement for a lesser showing that the allegations were made "without reasonable cause." (Ill. Rev. Stat. 1977, ch. 110, par. 41; see *Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 815, 14 Ill. Dec. 489, 372 N.E.2d 685.) While we can sympathize with the physician's predicament, as with that of any person who, confronted with an unwarranted and unfounded lawsuit, must still expend time, money and suffer anxiety, nevertheless we feel, as have the other courts which have considered the problem (see Annot. 84 A.L.R. 3d 555, et seq.[2]), that this, unfortunately, is a price which must necessarily be paid to keep the courts open to the

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[2] The plaintiff has cited no case where an appellate court has upheld a complaint brought by a treating physician against his former patient or if deceased, the patient's family or the patient's attorneys for the bringing of a tort action against the physician where malicious prosecution has not been shown and this court has found none. *Drago* v. *Bounagurio* (1978), 61 A.D. 2d 282, 402 N.Y.S. 2d 250 cited by the plaintiff is not in point. In that case,

(footnote continued on following page)

people. It remains a valid truism that "[s]uch ordinary trouble and expense as arise from the ordinary forms of legal controversy should be endured by the law-abiding citizen as one of the inevitable burdens which men must sustain under civil government." (*Smith* v. *Michigan Buggy Co.* (1898), 175 Ill. 619, at 629, 51 N.E. 569, at 572.) The importance of free access to the courts demands that this access be maintained even though occasionally some innocent person must suffer.

III.

While we agree with Mr. Nathan that the claim against him must be dismissed for the same reason it must be dismissed as to the other three defendants, we cannot agree with his contention that he also cannot be held liable because he is not responsible for his wife's conduct. While the Married Women's Act makes it clear that damages for a civil injury committed by a married woman may be recovered from her alone (Ill. Rev. Stat. 1975, ch. 68, par. 4), it does not follow that a husband and wife cannot conspire together to commit a tort or jointly commit a tort. 21 Illinois Law and Practice, *Husband & Wife* §210.

IV.

Dr. Berlin has cross-appealed from the dismissal of Count II against Mr. Nathan for barratry. We agree with Dr. Berlin that under certain circumstances an action in tort might lie against a common barrator. After all, it is clear

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the court upheld a complaint by a physician who allegedly had never treated the deceased directly or indirectly during the fatal illness and who had been sued as a discovery device in order to ascertain where responsibility could be placed. No such flagrant and deliberate abuse of the legal system has been alleged here.

that at common law an action in tort could be brought against one guilty of maintenance (see for example *Fletcher* v. *Ellis* (Territory of Ark. 1836), 9 F. Cas. 266 (No. 4,863a); *Goodyear* v. *Dental Vulcanite Co.* v. *White* (C.C. S.D.N.Y. 1879), 10 F. Cas. 752 (No. 5,602)), and we see no reason why the same rules should not apply to common barratry. But we agree with the trial court that no action for common barratry could lie under the situation present in the instant case.

At common law, barratry or common barratry was defined as the offense of frequently exciting or stirring up suits and quarrels between others. Barratry did not consist of a single act but of several acts, and it has been stated that at common law at least three acts of a barratrous nature were necessary to commit the offense. (*Lyddon* v. *Shaw* (1978), 56 Ill. App. 3d 823, 14 Ill. Dec. 489, 372 N.E.2d 685; *State* v. *Noell* (1927), 220 Mo. App. 883, 295 S.W. 529; 14 Am. Jur. 2d *Champerty and Maintenance* §19.) It is the general practice and not the particular act which constitutes the crime of common barratry. (*Commonwealth* v. *Pray* (1832), 30 Mass. (13 Pick) 359.) Here even if the conduct of Mr. Nathan could be considered to constitute the stirring up of a single suit or quarrel, it alone was insufficient to constitute common barratry.

Furthermore, as pointed out in *Vitaphone Corporation* v. *Hutchinson Amusement Co.* (D. Mass. 1939), 28 F. Supp. 526 at 530:

> "* * * Blackstone described a barrator in volume 4, p. 125, as 'those pests of civil society that are perpetually endeavoring to disturb the repose of their neighbors and are officiously interfering in other men's quarrels.

> • • •' Assuming barratry still to be an offense in Maine and Massachusetts, where the activities complained of here took place, it would be difficult to suppose that the vexatious person or collection of persons that are called common barrators can be found to exist under the above described circumstances. There was no purpose on the part of either the distributors or the Bureau to foment suits in order to oppress persons. *Commonwealth* v. *McCulloch*, 15 Mass. 227. And, surely, the definition in Blackstone cannot fit persons engaged in protecting their legitimate business enterprises.''

We do not believe that this definition can apply to a person trying to protect his legitimate domestic enterprise, that is, his family, any more than it can to one protecting a legitimate business enterprise. Compare also *Milk Dealers Bottle Exchange* v. *Schaffer* (1922), 224 Ill. App. 411.

Dr. Berlin, however, argues that the codification of the offense into statutory form has abolished the common law offense. Ill. Rev. Stat. 1975, ch. 13, par. 21 reads as follows:

> ''If any person shall wickedly and wilfully excite and stir up any suits or quarrels between the people of this state, either at law or otherwise, with a view to promote strife and contention, he shall be deemed guilty of the petty offense of common barratry; and if he be an attorney or counselor at law, he shall be suspended from the practice of his profession, for any time not exceeding six months.''

Even if we were to agree with the plaintiff that the statute has abolished the common law offense, an issue we do not rule on, we cannot agree with the plaintiff that a single action runs afoul of the statute. If a statute is enacted which covers an area formerly covered by common law, such statute must be construed as adopting common law unless

there is clear and specific language showing that change in the common law was intended by the legislature. (*Proud* v. *W. S. Bills & Sons, Inc.* (1970), 119 Ill. App. 2d 33, 255 N.E. 2d 64, *leave to appeal denied.*) There is no clear and specific language in the statute indicating that it was intended to be more restrictive than common law. While the statute does refer to ***any*** suits or quarrels, we do not believe that the word ''any'' clearly indicates that the stirring up of a single suit or quarrel is sufficient since the statute refers to suits or quarrels in the plural. It is still the law in Illinois that the laws against champerty, maintenance and barratry are aimed at the prevention of multitudinous and useless lawsuits and at the prevention of speculation in lawsuits. *Milk Dealers Bottle Exchange* v. *Schaffer* (1922), 224 Ill. App. 411.

Furthermore, we note that the trend in the law has not been toward a more rigorous application of the laws against barratry, champerty and maintenance, but the converse. As the court in *Milk Dealers Bottle Exchange* v. *Schaffer* (1922), 224 Ill. App. 411 pointed out at p. 415:

> ''While the common-law crime of champerty has not been abolished by statute in this State, the tendency of decisions is to depart from the severity of the old law and at the same time to preserve the principle which tends to defeat the mischief to which the old law was directed, namely, 'the traffic of merchandizing in quarrels, of huckstering in litigious discord.' ''

Additionally, it is noted in 14 Am. Jur. 2d *Champerty and Maintenance,* §1, p. 842:

> ''The doctrines of champerty and maintenance, as known to the common law, arose at an early day in England from causes peculiar to the state of society

then existing. Out of the conditions then existing arose the common law rule which prohibited the assignment of choses in action and the sale and transfer of land held adversely. The progress of law, enlightenment, and civilization during the past few hundred years has, however, to a large extent obviated the necessity of the stringent rules. In none of the states are the doctrines of laws or champerty and maintenance preserved in their original rigor. In many states they are declared to be obsolete and to have no existence at all; in others they are preserved in a greatly modified form, usually by special statutes. Generally, choses of action are now assignable, and land held adversely may be sold and transferred. Considering the status of society and conditions now prevailing in this country, to transfer a right of action or to maintain the suit of another without having any direct or contingent interest in it will by no means necessarily produce mischief or oppression. Indeed, it may be that such assistance or maintenance will have a tendency to secure rights and promote the ends of justice."

Indeed, we doubt the constitutionality of any statute which could be considered to bar the giving of unsolicited advice by one person to another, without charge, that that person may have a remedy at law and should peruse it, where the first person is not, as was the case in *Ohralik* v. *Ohio State Bar Assn.* (1978), ... U.S. ....., 56 L. Ed.2d 444, 98 S. Ct. 1912, attempting to obtain remunerative employment for himself as legal counsel. As Mr. Justice Marshall remarked in his concurring opinion in that case, at ..... U.S. ....., 56 L. Ed.2d 464, 98 S. Ct. at 1928:

> "The provision of such information about legal rights and remedies is an important function, even where the rights and remedies are of a private and commercial nature involving no constitutional or political overtones. See *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 221-223 (1967). See also *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 585 (1971)."

And as was pointed out in *In re Primus* (1978), ... U.S. ....., 56 L. Ed.2d 417, at 434, 98 S. Ct. 1893, at 1904, 1905:

> "The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights.' *Button*, 371 U.S. at 437, including 'advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys * * * for assistance,'" *id.*, at 434.

While it is true that both *Primus* and *NAACP* v. *Button* (1963), 371 U.S. 415, 9 L. Ed.2d 405, 83 S. Ct. 328 were cases involving "constitutional and political overtones" and that the court in both distinguished the cases involving private litigation for private gain, serving no public interest, we suspect that the providing of information about legal rights may be on occasion constitutionally protected even where merely private and commercial rights are involved. However, that question is not before us in this case, since, while the defendant, Mr. Nathan, raised the issue in his answer, he has waived it by not raising it on appeal. *Berk* v. *Will County* (1966), 34 Ill. 2d 588, 218 N.E.2d 98; Ill. Rev. Stat. 1977, ch. 110A, par. 341(e)(7).

(Appellate Court Opinion)

For the reasons previously discussed in this opinion, the judgment of the trial court in favor of Dr. Berlin is reversed and the case is remanded for the entry of an order dismissing the plaintiff's complaint. The judgment on the cross-appeal is affirmed.

REVERSED IN PART AND REMANDED.

AFFIRMED IN PART.

JOHNSON, P.J. and DIERINGER, J., concur.

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

January 25, 1979

Mr. Wayne B. Giampietro
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134 North LaSalle Street
Suite 1100
Chicago, IL 60602

No. 51367—Leonard Berlin, petitioner, vs. Gilbert Nathan, et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX C

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

March 14, 1979

Ligtenberg, DeJong, Poltrock
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134 N. LaSalle Street
Suite 1100
Chicago, IL 60602

In re: Leonard Berlin, petitioner, vs. Gilbert Nathan, et al., respondents. No. 51367

Gentlemen:

The Supreme Court today made the following announcement concerning the above entitled cause:

> The motion by petitioner for reconsideration and to vacate the order denying petition for appeal as a matter of right is denied.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court